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Comments

Direct Actions—Insurance Contracts*

By passage of the Direct Action Statute¹ the Louisiana Legislature not only took unprecedented action as to the scope of regulating insurance but also conferred upon an injured party a unique² method of obtaining relief against insurers. Since its

* Without committing them to any of the opinions herein expressed, the writer acknowledges with gratitude the help furnished by Mr. Minos H. Armentor of the New Iberia Bar; Mr. John M. Madison of the Shreveport Bar; and Mr. John A. Patin of the Lake Charles Bar.

1. La. Act 253 of 1918, as amended by La. Acts 55 of 1930 and 541 of 1950; La. R.S. 1950, 22:655. The present statute reads: "No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. *This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.* Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state." (Italics supplied.)

2. Wisconsin has a somewhat similar statute; however, its application is limited to actions arising from automobile accidents. See Wis. Stat. 1951, §§ 85.93, 260.11. Application of the Wisconsin statute will be found in the following cases: *Lang v. Baumann*, 213 Wis. 258, 251 N.W. 461 (1933); *Ortel v. Williams*, 214 Wis. 68, 251 N.W. 465 (1933); *Byerly v. Thorpe*, 221 Wis. 28, 265 N.W. 76 (1936); *Kujawa v. American Indemnity Co.*, 245 Wis. 361, 14 N.W. 2d 31 (1944); *Ritterbusch v. Sexsmith*, 356 Wis. 507, 41 N.W. 2d 611 (1950).

In *Ortel v. Williams*, supra, the Wisconsin statute was held to be procedural in that the "direct action" against the insurer can be enforced in Wisconsin even if based on a tort committed in another state. (The insurance policy involved was a Wisconsin contract.)

In the case of *Pawlowski v. Eskofski*, 209 Wis. 189, 244 N.W. 611 (1932), the Supreme Court of Wisconsin held that to give the statute retroactive effect would make it unconstitutional as impairing the obligations of contracts; therefore, the rights granted by the statute could not be asserted

enactment, the statute³ has had a very stormy life. A proper understanding of this turbulent reception requires a review and appreciation of the history of the direct action statute; hence this comment will deal with (1) the historical background of the present act,⁴ and (2) a brief discussion of the cases interpreting the present statute and its predecessors, pointing up certain apparently conflicting views.

HISTORY

There is nothing novel in the idea that states may regulate corporations. The scope of regulation is practically unlimited. The opinion in *Paul v. Virginia*,⁵ a decision in the field of insurance, epitomizes this rule. The natural result of that decision was more extensive regulation of insurance by the states. Such regulation has not been confined to the prerequisites required of the insurance company to do business within a state, but has included legislation concerning the respective rights of the assured, insurer and the injured party. The natural reaction of the insurance corporation was a search for legitimate means to protect its interest.

Prior to enactment of the direct action statute, the right of an injured third person to recover on a liability policy was dependent upon the construction of the policy itself. In contracts for indemnity "against liability," a judgment against the insured created that liability, giving rise to a right in the judgment creditor to the proceeds of the insurance;⁶ but many insurance com-

where the policy was issued and the accident sued on occurred prior to the effective date of the statute. Further, in the case of *Byerly v. Thorpe*, supra, the court refused to allow joinder of the insurer with the insured in a case where, though the tort was committed in Wisconsin, the policy involved was written in Illinois and contained a "no action" clause valid in that state. The court held that it would be an impairment of a contractual obligation and hence unconstitutional.

3. See note 1 supra.

4. See note 1 supra.

5. 8 Wall. 168 (U.S. 1868). This case held that insurance was not commerce; and hence, subject to virtually unlimited state regulation. *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944) in effect overruled *Paul v. Virginia*, and held that insurance was *in* commerce and when conducted across state lines was interstate commerce, subject to regulation by the Congress under the United States Constitution. That the *South-Eastern Underwriters* case paved the way for eventual federal regulation of insurance cannot be questioned; however, the immediate effect of this decision was the enactment of the McCarren Act (59 Stat. 33 [1945], 15 U.S.C. § 1011 et seq. [1945]), which was designed to continue and to reinforce state regulation of insurance.

6. Vance, Insurance, 999-1000, § 196 (3 ed. 1951); Richards, Insurance, 901-902, § 503 (4 ed. 1932).

panies inserted clauses in the policy obligating themselves to indemnify the insured "for loss actually sustained and paid by the insured," or, as in other policies, "for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue." These clauses, commonly referred to as "no action" clauses, were rigidly upheld.⁷ The insured could not recover until he had proved a payment or satisfaction of his liability.⁸ Where the insured became insolvent or bankrupt during or after the trial, the injured party secured merely a worthless judgment. The insured, not being able to pay the judgment, lost nothing; consequently, the condition precedent to the insurer's liability never occurred.⁹

By the devices above described insurance companies were often able to escape liability. Legislation to correct this apparent inequity was deemed necessary by the Louisiana Legislature. The first such remedial act was passed by the Legislature in 1918.¹⁰ This act provided, in effect, that insolvency or bankruptcy of the insured would not release the insurer from liability, but would give to the injured party a right of action against the insurance company "within the terms and limits of the policy." The insurance carrier was allowed to require, however, that judgment first be obtained against the assured, and his insolvency, or bankruptcy, made to appear by proper proof.¹¹ The scope of the 1918 act¹² was broadened by an amendment in 1930¹³ to give to an injured party a direct right of action against the insurer "within the terms and limits of the policy." Thus it was no longer necessary for the injured party first to obtain judgment against the insured.¹⁴ The phrase "within the terms and limits of the policy," has been interpreted to refer to such terms as the time

7. 8 Appleman, *Insurance Law and Practice*, § 485 (1941).

8. *Allen v. Aetna Life Ins. Co.*, 145 Fed. 881, 7 L.R.A. (N.S.) 958 (3rd Cir. 1906). See authorities collected in Note, 37 A.L.R. 637.

9. *Thacher v. Aetna Accident & Liability Co.*, 287 Fed. 484 (8th Cir. 1923).

10. La. Act 253 of 1918. Such remedial legislation was by no means limited to Louisiana. Cf. Comment, 9 *Oregon L. Rev.* 57 (1930); Notes, 15 *Iowa L. Rev.* 73 (1930), 46 *Harv. L. Rev.* 1325 (1933).

11. *Edwards v. Fidelity & Casualty Co.*, 11 La. App. 176, 123 So. 162 (1929). Here the court held proper proof of bankruptcy, or insolvency, to be an unsatisfied judgment against the insured.

12. See note 10, *supra*.

13. La. Act 55 of 1930.

14. Though the act was given retroactive effect is constitutionality was upheld; it was held not to impair the obligations of contract. *Gager v. Teche Transfer Co.*, 143 So. 62 (La. App. 1932); *Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co.*, 18 La. App. 725, 138 So. 183 (1931).

within which notice had to be given, the character of the risk involved, and the time within which suit might be brought.¹⁵

Prior to 1948 the Louisiana Legislature had passed laws regulating insurance and had amended these acts from time to time, but there had been no effort to collect this body of the law and codify the same. This situation was remedied by the adoption of the Insurance Code of 1948.¹⁶ Within this compilation we find the direct action statute as Section 14.45.¹⁷

A general compilation of all laws was effected in 1950 by the adoption of the Louisiana Revised Statutes of that year.¹⁸ The newly adopted insurance code was embodied in the Revised Statutes of 1950 as Title 22, and the direct action statute became Section 655 of that title.¹⁹ At the regular session of the Legislature that year, Act 541, which amended Section 655,²⁰ was passed. There seems to be a fairly obvious reason why this act was passed, and in the discussion of the cases which follow, the writer will endeavor to disclose such reason. Suffice it for the present to say that passage of Act 541, and its companion, Act 542,²¹ has created lively interest on the part of both bench and bar and considerable diversity of opinion.

15. *Rambin v. Southern Sales Co.*, 145 So. 46 (La. App. 1932). In *Bougon v. Volunteers of America*, 151 So. 797, 801 (La. App. 1934), an insurance company contended that the act only gave the injured party a direct right of action when there was no clause inserted in the insurance contract forbidding such action. The court in holding such contention a "manifest absurdity," said: "The foundation of the action of the insured is in contract, to which the injured party is a stranger, except insofar as the statutory provisions may be incorporated in the policy." See also *Graham v. American Employers' Ins. Co.*, 171 So. 471 (La. App. 1937), wherein it was held that the statutory provisions were controlling over contrary policy provisions.

16. La. Act 195 of 1948.

17. Louisiana Insurance Code of 1948, § 14.45.

18. La. Act 2 of 1950 (2 E.S.).

19. La. R.S. 1950, 22:655.

20. La. Act 541 of 1950, amending La. R.S. 1950, 22:655.

21. La. Act 542 of 1950, adding La. R.S. Supp. 1950, 22:983E, which reads as follows: "No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this Title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. The said foreign or alien insurer shall deliver to the Secretary of State as a condition precedent to the issuance of such authority, an instrument evidencing such consent."

INTERPRETATION AS DISCLOSED BY THE REPORTED CASES

Since the 1918 act²² does not purport to confer upon the injured party a direct cause of action strictly speaking, the cases interpreting this act will not be discussed here.²³

The present discussion of the cases dealing with the 1930 act²⁴ will by no means be exhaustive, but selective only. The 1930 act has been held to be retroactive in its application and the right of direct action thus provided has been made available against an insurer on a policy written prior to the effective date of the act.²⁵ That retroactive legislation, in the remedial as distinguished from the substantive field, is constitutional is hardly open to question. It has been held that the remedy provided by the 1930 act is enforceable in Louisiana in a suit on an accident which occurred therein, even though the contract of insurance was written in another state and the policy contained a "no action" clause which was valid in the state where the contract was executed.²⁶ Further, the right of direct action under this act cannot be maintained in another jurisdiction even though based on an accident which occurred in Louisiana.²⁷ The courts in these

22. La. Act 253 of 1918.

23. An application of this act will be found in the following cases: *Lawrason v. Owners' Automobile Ins. Co. of New Orleans*, 172 La. 1075, 136 So. 57 (1931); *Edwards v. Fidelity and Casualty Co. of New York*, 11 La. App. 176, 123 So. 162 (1929).

24. La. Act 55 of 1930.

25. See note 14, *supra*.

26. *Robbins v. Short*, 165 So. 512 (La. App. 1936).

27. *Wells v. American Employers' Ins. Co.*, 132 F. 2d 316 (5th Cir. 1942); *McArthur v. Maryland Casualty Co.*, 184 Miss. 663, 186 So. 305 (1939). In both the *Wells* case and *McArthur* case the conflict of laws situation was the same; that is, the tort was committed in Louisiana and the suit was brought in another state. In neither case was the direct action statute applied; for this conflict situation, the statute was held to be procedural. Another conflict situation was presented in the case of *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So. 2d 875 (1946). Therein a wife's suit against her husband's liability insurer was disallowed. The tort occurred in Mississippi and the suit was brought in Louisiana. Both husband and wife were Louisiana residents. Under the law of Mississippi a wife does not have a right or cause of action against her husband for a tort committed against her. The court pointed out that "The Statute does not give plaintiff any more rights than she has under the law of Mississippi. *It only furnishes her with a method to enforce in Louisiana whatever rights she has in Mississippi.* The mere fact that under the statute plaintiff was able to obtain jurisdiction against her husband's liability insurer in a direct action in this state does not create, as against her husband, or as against his insurer, a substantive cause of action that does not exist under the law of the State where the wrongful act occurred." (Italics supplied.) 209 La. 495, 503, 24 So. 2d 875, 877. The holding in the *Burke* case is consonant with the holdings in the *Wells* and *McArthur* cases that the direct action statute for conflict purposes is procedural.

cases accepted the interpretation of the act as handed down by the Louisiana courts.²⁸

The Louisiana courts have held that in a suit against the insurer alone—the tortfeasor not being joined as a party defendant—the insurer cannot set up defenses which are purely personal to the insured.²⁹ In the case of *Harvey v. New Amsterdam Casualty Company*³⁰ the court of appeal held that a plea of coverage, available to the husband to defeat recovery by his wife for injuries resulting from his negligent operation of an automobile, was a personal defense which was not available to the husband's liability insurer. The Louisiana Supreme Court in a later case held that a wife could not sue her husband's liability insurer for injuries sustained by her in an accident which occurred in Mississippi as a result of her husband's alleged negligence.³¹ There the court said: "Where the action is brought in one jurisdiction for a tort committed in another the rights and liabilities of the parties are determined by the laws of the place where the wrong is committed and not by the laws of the place where the right of action is asserted."³²

Since the larger percentage of insurance corporations are foreign corporations, federal jurisdiction is frequently invoked on grounds of diversity of citizenship.³³ A reading of the federal cases discloses that the jurisdiction question was first pin-pointed in the case of *New Amsterdam Casualty Company v. Soileau*.³⁴

In the field of federal jurisdiction the direct action statute

28. *Graham v. American Employers' Ins. Co.*, 171 So. 471 (La. App. 1937); *Robbins v. Short*, 165 So. 512 (La. App. 1936); *Gager v. Teche Transfer Co.*, 143 So. 62 (La. App. 1932); *Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co.*, 18 La. App. 725, 138 So. 183 (1931).

29. *Rome v. London & Lancashire Indemnity Co.*, 169 So. 132 (La. App. 1936) (public liability insurer of municipality cannot raise defense of sovereign immunity); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1935) (minor child can bring suit and recover against his father's insurer); *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935) (wife may sue insurer of the car owned in community and recover for her personal injuries).

30. 6 So. 2d 774 (La. App. 1942). See the authorities therein collected.

31. *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So. 2d 875 (1946). See discussion under note 27, *supra*.

32. *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 499, 500, 24 So. 2d 875, 876. See also *A.L.I., Conflict of Laws*, § 384 (1934).

33. 28 U.S.C. § 1332 (1946).

34. 167 F. 2d 767 (5th Cir. 1948). Here jurisdiction was specially upheld. In the following earlier cases it appears jurisdiction was assumed without argument: *Banks v. Associated Indemnity Corp.*, 161 F. 2d 305 (5th Cir. 1947); *Standard Accident Ins. Co. v. Rivet*, 89 F. 2d 74 (5th Cir. 1937); *Bunkers Indemnity Ins. Co. v. Leake*, 84 F. 2d 191 (5th Cir. 1936).

has received varied treatment. Judge Dawkins in a 1945 decision³⁵ held that the 1930 act "does not increase the liability of the insured at all or deprive the insurer of any defense to which it would otherwise be entitled. It simply says that, instead of pursuing the circuitous route of first suing a tortfeasor, and then, if necessary, bringing an action against the insurer, the whole matter may be determined once and for all by suing the insurer direct, who may have all the benefits of any defense, which could be claimed by its principal, the insured."³⁶ The judge further stated that the Louisiana statute (Act 55 of 1930) does not affect the obligation of the insurance contract even though the policy was issued outside the State of Louisiana and contained a "no action" clause which was valid in the state in which the contract was issued. He said the act merely affected the order in which persons could sue upon the insurance contract. And further, Judge Dawkins was of the opinion that the insurance contract was "tripartite in its nature, since the very purpose was to provide for the payment or indemnification of the insured for any and all claims of every person lawfully ascertained against him."³⁷

Until the adoption of the Insurance Code³⁸ the direct cause of action as applied to policies issued outside the state appears to have been fairly well settled. However, in the case of *Belanger v. Great American Indemnity Company of New York*,³⁹ Judge Wright, in denying the direct action on an insurance contract issued outside the state, said: "The Louisiana Legislature with full knowledge of this line of jurisprudence giving extraterritorial effect to Act 55 repealed the act and enacted Section 14.45 of the Louisiana Insurance Code. The intention of the Legislature to limit Section 14.45, under which the right of direct action against liability insurers is now provided, to policies of insurance issued in Louisiana is manifested by the first clause of the act which reads as follows: 'No policy or contract of liability insurance shall be issued or delivered in this State. . . .' By this language it is apparent that the Legislature rather than risk the possibility of Section 14.45 being declared unconstitutional as

35. *Rogers v. American Employers' Ins. Co.*, 61 F. Supp. 142 (W.D. La. 1945).

36. *Id.* at 143.

37. *Ibid.* It might be noted that Judge Dawkins was aware of the contrary decision of Judge Caillouet in the case of *Wheat v. White*, 38 F. Supp. 796 (E.D. La. 1941).

38. La. Act 195 of 1948.

39. 89 F. Supp. 736 (E.D. La. 1950).

applied to out of state liability policies specifically limited its application to policies issued in Louisiana."⁴⁰ The position taken by Judge Wright was affirmed by the Fifth Circuit Court of Appeals in a per curiam opinion⁴¹ handed down after passage of Act 541 of 1950.⁴² On appeal, counsel for plaintiff called the court's attention to the aforesaid act and a concurrent resolution adopted by the Louisiana Legislature on June 26, 1950, to the effect that it was never the intention of the 1948 Legislature, in enacting Section 14.45, to repeal or in any wise restrict Act 55 of 1930 so far as it provided direct action against liability insurers. Reversal of the district court's order had been sought on the theory that the direct action is remedial and procedural and hence that Act 541 of 1950 should be given retroactive effect even though the order might have been proper when entered. The court summarily dismissed this contention: "The defendant was entitled to have its rights determined in accordance with existing law, and this being done, the adjudication may not be annulled by subsequent legislation."⁴³ It might be noted that the constitutional question discussed by the district court was not mentioned.

It would appear that the Legislature had in mind the rule enunciated by the lower court in the *Belanger* case when it passed Acts 541 and 542 of 1950. Act 541 was apparently designed to overrule that case by legislative act. Act 542 was apparently designed to overcome any constitutional objections to Act 541. This would seem to follow when it is recalled that the district court in the *Belanger* case stated in dictum that the application of a direct action statute to a case involving a policy issued and delivered outside of the state was unconstitutional if such policy contained a "no action" clause.

Judge Dawkins had occasion to deal with points similar to

40. *Id.* at 738. The court further added: "There is a further and even more fundamental reason why the plaintiff cannot maintain his direct action against the insurer in this case. The policy of insurance herein relied on has a 'no action' clause and is governed by the law of Massachusetts where 'no action' clauses in policies of insurance are permitted under the laws of the state." To allow him to invalidate a substantial part of that contract by applying Section 14.45 of the Louisiana Insurance Code is to deprive the defendant of due process of law in violation of the Constitution of the United States.

41. *Belanger v. Great American Indemnity Co. of N.Y.*, 188 F. 2d 196 (5th Cir. 1951).

42. See note 1 *supra*.

43. *Belanger v. Great American Indemnity Co. of N.Y.*, 188 F. 2d 196, 198 (5th Cir. 1951).

those involved in the *Belanger* case. In the case of *Bouis v. Aetna Casualty and Surety Company*⁴⁴ plaintiff, a Louisiana resident, brought a direct action against the non-resident insurer of the manufacturer of a shotgun which had exploded in plaintiff's face. The insurance contract sued on had been issued and delivered outside the state and contained a "no action" clause which was valid in the state of delivery. Section 14.45 of the Insurance Code was in effect when the policy was issued, when the accident happened and when suit was filed. The defendant insurer urged: (1) that the law of Louisiana at the time the policy was written limited the right to sue the insurer alone, without first reducing the claim to judgment against the insured, to cases where the policies were written or delivered in Louisiana; (2) that if interpreted so as to permit a direct action in this case, the act would impair the obligations of its insurance contract in violation of Section 10 of Article I of the United States Constitution and Section 1 of Article IV requiring "full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State," and would violate the due process and equal protection clauses of the Fourteenth Amendment. The court rejected these contentions and concluded that Section 14.45 of the Insurance Code applied when plaintiff's suit was filed and that at that time the action against the insurer was premature because of the "no action" clause and the rule expressed in the *Belanger* case. However, plaintiff's action was not defeated. The court reviewed the direct action statutes and concluded: "It seems to be settled that these statutes do deal with procedure alone. . . . Therefore, this court feels impelled to overrule the claims of unconstitutionality, under the Federal Constitution."⁴⁵ Since Acts 541⁴⁶ and 542⁴⁷ had become effective before the decision was handed down, the court applied them retroactively to sustain plaintiff's claim even though his suit was premature when brought. When the instant case arose there had been no state decision construing these acts; the court therefore applied general principles of statutory construction and decided both acts were procedural. The court reviewed the holding in *Shreveport Long Leaf Lumber Company v. Wilson*⁴⁸ and said: "In view of this ruling [that procedural legislation may be given

44. 91 F. Supp. 954 (W.D. La. 1950).

45. *Id.* at 957.

46. See note 1 *supra*.

47. See note 21 *supra*.

48. 195 La. 814, 197 So. 566 (1940).

retroactive effect] by the state court, since it is settled that the right to sue the insurer directly and without previous reduction of the claim to judgment against the insured, does not involve a substantive right but merely procedure, the remedy in that respect found in Acts Nos. 541 and 542 of 1950 is available and applies to the proceeding before us, they simply having rendered invalid the provisions of the policy prescribing the procedure which required that judgment should first be obtained against the insured."⁴⁹

In the case of *Bayard v. Traders & General Insurance Company*⁵⁰ Judge Dawkins handed down a decision exactly contra to that rendered by him in the *Bouis* case. In the *Bayard* case, the contract had likewise been issued and delivered outside the state by a nonresident insurer and contained the "no action" clause. The plaintiff was a Louisiana resident. Judge Dawkins viewed at length previous Louisiana cases decided in both state and federal courts and observed: "It thus appears that there has been much confusion and disagreement both among the state courts of Louisiana and in the decisions of the federal courts of this state, some holding that Act No. 55 of 1930 had created a substantive right which necessarily changed and enlarged the obligations of the insurer where the policy contract had been made in other states whose laws permitted the 'no action' stipulation; while in others, it was said that the provision for direct action against the insurer alone was merely procedural or remedial."⁵¹ The court then decided that it must determine for itself what constitutes substantive, as distinguished from procedural law. Along this line the court commented: "The tort action of the Code is the basis for all liability of this kind, and it makes responsible only the person who committed the wrong. Act No. 55 of 1930 has in effect attempted to add to Article 2315 another person in no wise at fault simply because he has agreed for a premium to indemnify the tort-feasor within limits against his own wrongs, after they have been proven."⁵² Judge Dawkins then added, "I am finally convinced that Act No. 55 of 1930 made a fundamental and substantial change in the right of action under those indemnity policies, or, as they are now called, liability con-

49. *Bouis v. Aetna Casualty & Surety Co.*, 91 F. Supp. 954, 959-960 (W.D. La. 1950).

50. 99 F. Supp. 343 (W.D. La. 1951).

51. *Id.* at 353.

52. *Id.* at 354.

tracts, *not confined to procedure or remedy.*"⁵³ (Italics supplied.) The direct action remedy was then found to be a permissible expression of the Legislature as applied to insurance contracts made in Louisiana. But with reference to contracts lawfully made and to be executed in other states, the court held that the Federal Constitution⁵⁴ prevents the exercise of *arbitrary power not founded upon some legitimate principle of state public policy.* (Italics supplied.) And the court in sustaining the defendant insurer's motion to dismiss evidently did not find this legitimate principle of state public policy.

In evaluating the *Bayard* case, it is well to keep in mind the rule of *Erie Railroad v. Tompkins*,⁵⁵ that in a diversity case a federal court adjudicating a state-created right is for that purpose, in effect, only another court of the state.⁵⁶ Though the federal court is bound by the interpretation placed on the state statute, it may nevertheless strike the statute down on constitutional ground.⁵⁷ In the *Bayard* case the constitutional objection was held to be applicable only to contracts lawfully made and to be applied in other states. It might be noted that at this juncture the decisions of the Eastern and Western Districts of the federal courts were in accord.⁵⁸

Judge Porterie of the United States District Court for the Western District of Louisiana in the case of *Buxton v. Midwestern Insurance Company*⁵⁹ disagreed with the position taken by Judge Dawkins of the same district. In the *Buxton* case, plaintiff, a Louisiana resident, brought a direct action against Midwestern and Pacific for personal injuries sustained when an automobile driven by Midwestern's insured, and in which plaintiff was riding as a guest, was involved in a collision with an automobile owned by Pacific's insured. Defendant Pacific moved to dismiss. In denying the motion the court held that since Pacific had consented to being sued directly in accordance with R.S. 22:983E, a direct action by plaintiff was permissible. Plaintiff's action was founded on two different insurance contracts, one issued and delivered in

53. *Id.* at 354-355.

54. U.S. Const. Art. IV, § 1, Art. I, § 10, and 14th Amend. § 1.

55. 304 U.S. 64 (1938).

56. Moore, *Commentary on the United States Judicial Code* 317, ¶ 0.03(45) (1949).

57. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 73 S. Ct. 143 (U.S. 1952).

58. *Bayard v. Traders & Gen. Ins. Co.*, 99 F. Supp. 343 (W.D. La. 1951); *Belanger v. Great American Indemnity Co. of N.Y.*, 89 F. Supp. 736 (E.D. La. 1950).

59. 102 F. Supp. 500 (W.D. La. 1952).

Louisiana, the other issued and delivered in Texas. The latter contained a "no action" clause which was valid in that state. Even though it was not sued on a contract which was issued in Louisiana, Pacific was nevertheless doing business here and had complied with the "consent to be sued" provision of Act 542 of 1950. Although the court said that the question before it was the constitutionality of Acts 541 and 542 of 1950,⁶⁰ a careful reading of the case does not indicate that this issue was squarely ruled upon.⁶¹ The following language is found in the opinion, however: "The Act, La. Act 542 of 1950, makes no hostile discrimination against or among foreign or alien insurers; it merely tends to put them on the same footing as domestic insurers. Resident and non-resident insurers are treated alike."⁶² The court's determination that Pacific was bound by its consent to be sued directly on policies issued out of Louisiana as a result of accidents happening in Louisiana, rendered it unnecessary to determine whether Act 541 of 1950 was procedural or substantive law. The court intimated that the *Soileau* case⁶³ was decided at a time when there was no law comparable to Act 542 of 1950. As to the Texas law permitting and enforcing a "no action" clause in its insurance policies, the court posed the constitutional question conversely, that is, would not the Texas law have extraterritorial effect if held to be enforceable in Louisiana in the face of contrary Louisiana policy and laws? This question was pretermitted.

Judge Dawkins a few days later handed down his opinion in *Bish v. Employers Liability Assurance Corporation*,⁶⁴ which held exactly contra to the decision in the *Buxton* case. Plaintiff, a Louisiana citizen, sued the insurer of the Toni Corporation for injuries she sustained as a result of using a Toni home permanent. The defendant in the *Bish* case, a foreign corporation, had likewise complied with Act 542 of 1950. The contract sued upon contained a "no action" clause which was valid in the state in which the contract was issued. The court, adhering to its posi-

60. *Id.* at 505.

61. *Id.* at 507, 508. "The insurer, Pacific, can rightfully be sued here also. It is found here. . . . Consequently, we do not reach—and need not overreach to inquire into—the constitutional objections raised by Pacific." And further: "In other words, there is no impairment of the obligations of its insurance contract with Houston, because, at the time of the confecton of that contract affected by the public interest, Pacific was doing business in Louisiana and by its own voluntary consent it never became an obligation to the [sic] impaired."

62. *Id.* at 509.

63. See note 34 *supra*.

64. 102 F. Supp. 343 (W.D. La. 1952).

tion in the *Bayard* case,⁶⁵ said: "After careful consideration of the arguments and authorities cited by plaintiff, the writer is still of the view that *if these statutes are to be held valid at all, their operation must be confined to Louisiana contracts*. Any other conclusion would give them an extraterritorial effect not permissible."⁶⁶ (Italics supplied.) The court further observed that the Louisiana statutes authorizing direct action against the insurer constituted arbitrary deprivation of property without due process, contrary to the Fourteenth Amendment of the Federal Constitution. This observation applied even if the policy sued upon was written and delivered in Louisiana.⁶⁷

In point of time, it appears that the *Bish* case was followed by *Fisher v. Home Indemnity Company*.⁶⁸ In the latter, the Fifth Circuit Court of Appeals ruled that the direct action would not lie in view of a "no action" provision in the policy sued on. This holding sustained the ruling of the district court. In the instant case, plaintiff, a Louisiana resident, allegedly sustained injuries from consuming a medicinal preparation known as "Westsal." Suit was brought against the foreign insurer of the nonresident pharmaceutical manufacturer. The contract sued on was executed and delivered outside the state and the defendant had qualified to do business in Louisiana. The defendant had not filed the consent to be sued until after the case had been tried below, and such consent was not called to the attention of the district court until after the cause had been decided by it, and the record had been lodged with the appellate court.

The decision of the Fifth Circuit Court of Appeal in *Employers Mutual Liability Insurance Company v. Eunice Rice Milling Company*⁶⁹ followed in the wake of the *Fisher* holding. Plaintiff, a Louisiana resident, had sued on a contract executed and delivered in Texas by the defendant, a Wisconsin insurance corporation. In a brief opinion, Chief Justice Hutcheson, as organ of the court, struck down the plaintiff's attempt to sue the insurer directly. Judge Russell, who had been with the majority in the *Fisher* case, dissented. The opinion of the majority was based upon

65. See note 50 supra.

66. 102 F. Supp. 343, 345 (W.D. La. 1952).

67. Apparently the court overlooked its position in the *Bayard* case. See text immediately following note 53, wherein the same court held the direct action to be a permissible expression of the Legislature as applied to insurance contracts made in Louisiana. See p. 505 supra.

68. 198 F. 2d 218 (5th Cir. 1952).

69. 198 F. 2d 613 (5th Cir. 1952), cert. denied 73 S. Ct. 171 (U.S. 1952).

the ruling in the *Fisher* case, and, as Judge Russell aptly points out, it overlooks the stipulation in the contract in the second case limiting coverage to "operations performed in the State of Louisiana." Furthermore, the insurer was authorized to do and was doing business in Louisiana.

In the case of *Cushing v. Maryland Casualty Company*⁷⁰ Judge Strum, as organ for the Fifth Circuit, reversed a dismissal of plaintiff's direct action by Judge Wright of the district court. The position taken by Judge Strum is not necessarily inconsistent with his position in the *Fisher* and *Eunice Rice Milling Company* cases. It will be recalled that in those cases the contract sued on had been issued outside the state whereas in the present case the policies involved were issued and delivered in Louisiana. For the proposition that the Louisiana direct action statute is remedial, the court cited *Gager v. Teche Transfer Company*⁷¹ and *Hudson v. Georgia Casualty Company*.⁷²

A subsequent expression of Judge Dawkins' position will be found in the case of *Mayo v. Zurich General Accident and Liability Insurance Company*.⁷³ Plaintiff, a Texas resident, was injured in Louisiana as a result of an automobile accident involving another Texas resident. Suit against the tortfeasor's insurer was brought directly. The defendant, a Swiss corporation, was qualified to do business in Louisiana and had complied with the provisions of Acts 541 and 542 of 1950. The contract sued on was issued and delivered in Texas and contained a valid "no action" clause. The court was of the opinion that the effect of the direct action statute was a deprivation of the defendant's property—the benefits of contract provisions valid in the state where made—without due process of law and hence contrary to the Fourteenth Amendment to the Federal Constitution. The court relied on its decisions in the *Bayard* and *Bish* cases.

The case of *Elbert v. Lumbermen's Mutual Casualty Company*⁷⁴ presented an instance in which both the injured party and alleged tortfeasor were Louisiana residents. Plaintiff, a guest in the automobile of defendant's assured, was injured as she alighted therefrom. Suit was brought against the insurer directly on a

70. 198 F. 2d 536 (5th Cir. 1952).

71. See note 14 *supra*.

72. 57 F. 2d 757 (W.D. La. 1932).

73. 106 F. Supp. 579 (W.D. La. 1952).

74. 107 F. Supp. 299 (W.D. La. 1952), rehearing denied 108 F. Supp. 157 (W.D. La. 1952).

policy issued in Louisiana. A motion to dismiss the complaint on the grounds that there was no diversity of citizenship between the real parties to the controversy was sustained. The court cited *Indianapolis v. Chase National Bank*⁷⁵ to sustain its position. Without considering the merits of this contention⁷⁶ and in view of the decisions in the *Soileau*⁷⁷ and *Cushing*⁷⁸ cases, it is submitted the holding in the *Elbert* case is clearly erroneous.

In the case of *Watson v. Employers Liability Assurance Corporation*,⁷⁹ Judge Dawkins reiterated his position. Therein Act 541 of 1950 was again held unconstitutional as to contracts made outside Louisiana. Plaintiffs, Louisiana residents, filed suit originally in the state court for Bienville Parish against the defendant, a nonresident insurer, alone. The suit was brought on a policy issued outside the state. The insurer removed to federal court on the grounds of diversity of citizenship. Plaintiffs then amended their complaint in an attempt to join the assured, also a nonresident, as a party defendant. Motion to dismiss on the grounds of unconstitutionality of the direct action statute was sustained. It is to be noted that the court in the *Watson* case said: "The decisions holding Act 55 of 1930 and Act 541 . . . of 1950 . . . unconstitutional as to contracts made outside the State and valid where made, *have had the effect of saying there is no right or cause of action originally against the insurer alone when it was filed in the State Court.*"⁸⁰ (Italics supplied.) The court pointed out that the issues involved in the motion to dismiss the insurer on the ground of the unconstitutionality of Act 541 of 1950 were the same as in the *Bish* case.⁸¹

Later, in the case of *Lewis v. Manufacturers Casualty Insurance Company*,⁸² Judge Porterie again sustained the validity of the direct action statute. In the *Lewis* case both plaintiffs and the alleged tortfeasors were Louisiana citizens. Federal jurisdiction was invoked solely on the ground of diverse citizenship, the plaintiffs suing the tortfeasors' liability insurer alone. The defendant

75. 314 U.S. 63 (1941).

76. On this point see Moore, Federal Practice, ¶ 17.01-17.02, 17.07 (2 ed. 1948); Clark and Moore, A New Federal Civil Procedure, 44 Yale L.J. 1291, 1310-1312 (1935). Cf. Notes, 34 Calif. L. Rev. 769 (1946), 65 Harv. L. Rev. 1066 (1952), 29 Marq. L. Rev. 129 (1946).

77. See note 34 *supra*.

78. See note 70 *supra*.

79. 107 F. Supp. 494 (W.D. La. 1952).

80. *Id.* at 495.

81. See note 64 *supra*.

82. 107 F. Supp. 465 (W.D. La. 1952).

was authorized to do business in this state and had filed consent to be sued as required by R.S. 22:983E. Though not specifically stated in the opinion, the contract sued on was apparently issued in Louisiana. Defendant insurer moved to dismiss on the grounds that (a) the complaint failed to state a claim upon which relief could be granted; (b) the provisions of Act 541 of 1950 were procedural and therefore not applicable; (c) the sole controversy was between plaintiff and the alleged tortfeasors, all Louisiana citizens; and (d) there was no "case" or "controversy" between plaintiffs and defendant. The court tersely dismissed (a) above with the remark that a claim upon which relief could be granted was plainly stated, citing Rule 8(a), Federal Rules of Civil Procedure.⁸³ As to (b) above the court said: "R.S. 22:655 has been declared so many times to be substantive by final authority that we deny this phase of defendant's motion without elaboration by merely citing the latest case on the point."⁸⁴ (Here the court cited the *Cushing* case.) In the same terse vein the court said whether or not there was a controversy between plaintiffs and the tortfeasors was immaterial to the issue involved, for the sole issue related to whether or not a "controversy" existed between plaintiffs and defendant. Answering the issue presented, the court said (inter alia): "We have already adjudicated that a *controversy exists between a wrongfully injured member of the public and the public liability insurer of the tort-feasor, irrespective of the citizenship of the insured tort-feasor and the wrongfully injured member of the public*, and that this Court has jurisdiction to hear and determine that controversy if there is diversity of citizenship between the injured and the insurer and over \$3,000, exclusive of interest and costs, is involved. . . . We have been affirmed on the point by a Court which we are bound to follow."⁸⁵ (Italics supplied.) (Here the court cited the *Soileau* case.) Though the constitutionality of the direct action statute was not specifically raised in the instant case, it is to be noted that the court adverted to the fact that the court had had the occasion to adjudicate on numerous constitutional objections levelled at these statutes. The *Buxton*, *Fisher* and *Cushing* cases were cited as sustaining the validity of said statute. The position of Judge Porterie in the *Lewis* case is not necessarily inconsistent with the position taken by Judge Dawkins in the *Watson* case,

83. Id. at 469.

84. Ibid.

85. Ibid.

for there the contract sued on was executed outside the state. However, it is utterly impossible to reconcile the position taken by Judge Dawkins in the *Elbert* case with that taken by Judge Porterie in the *Lewis* case.

SUMMARY AND CONCLUSION

A precise statement of the law relating to the Louisiana Direct Action Statute is impossible at the present due to the varied treatment given it by the judiciary. An analysis of the jurisprudence relating to the treatment of the direct action statute shows a distinction between insurance contracts of a Louisiana origin and those originating in another state. It would appear that the weight of authority would allow the use of direct action against the insurer when the contract or policy is made and issued in Louisiana. Some decisions like the *Bish* case indicate otherwise. However, it is submitted that direct action against the insurer should be available on all policies entered into in the State of Louisiana.

The real penumbra zone lies in the area of insurance policies entered into in other states when such contracts contain valid "no action" clauses. Here we find the conflict of extraterritorial effect of Louisiana Direct Action Statute versus extraterritorial effect of a "no action" clause valid in the state of origin. Authority for the constitutionality of the direct action statute in such a situation is found in the *Buxton* case. It would appear that the views of Judges Porterie and Christenberry would probably support the constitutionality of direct action in such instances. On the other hand Judges Wright and Dawkins undoubtedly find constitutional frailties in any application of direct action statutes to foreign insurance policies.

Examination of the history of the direct action statute clearly indicates a public policy behind this type of legislation. This policy is most cogently disclosed by Judge Porterie in the *Lewis* case: "The public policy of this State, announced time and again, is that an insurance policy against liability to the public is not issued primarily for the protection of the insured, *but for the protection of the general public.*"⁸⁶ (Italics supplied.) Ordinarily the public policy of a state is what the Legislature says that it shall be—unless the Legislature has acted beyond its sphere. It is submitted the purposes sought to be attained by the direct action

86. *Id.* at 471.

statute are legitimate and proper, and the means employed to that end are not arbitrary and capricious but constitute a valid exercise of the police power of the state. This observation, in the writer's opinion, is valid only insofar as applied to Louisiana contracts. Public policy of the state would seem to warrant upholding the direct action statute to that extent. However, as to contracts issued outside the state (and containing a valid "no action" clause), it would seem that the public policy of the state would come into conflict with certain constitutional prohibitions. It hardly seems equitable that merely because the insurer happened to be doing business in Louisiana, it should be sued directly on a contract which is in no manner connected with its business conducted in this state.

There is a line of cases which may lend weight to the above opinion. In *Terral v. Burke Construction Company*⁸⁷ an Arkansas statute which prohibited removal from state courts, was found unconstitutional. The statute provided for the revocation of the authority granted to any foreign company to do business in the state, if it either instituted a suit against a citizen of the state in a federal court or removed a suit brought by or against it in a state court to a federal court. A statute requiring, by way of a condition precedent to doing business in the state, a foreign corporation to agree that it will not resort to the federal courts was struck down as early as 1874.⁸⁸ Of course, it must be admitted that any argument based on these cases would have to be presented on the theory that the direct action statute is the converse of the statute involved in the foregoing cases; that the direct action statute is the converse of the non-removal statutes.

It is obvious that the present status of this phase of law is highly unsatisfactory. In view of the most recent decisions, compromise between the divergent views appears highly improbable; nor is the position taken by the Fifth Circuit Court of Appeals conducive to a settlement of the conflict. If our law on this subject is to emerge from this state of flux, judicial clarification is necessary.

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87. 257 U.S. 529 (1922).

88. *Home Ins. Co. v. Morse*, 20 Wall. 445 (U.S. 1874).